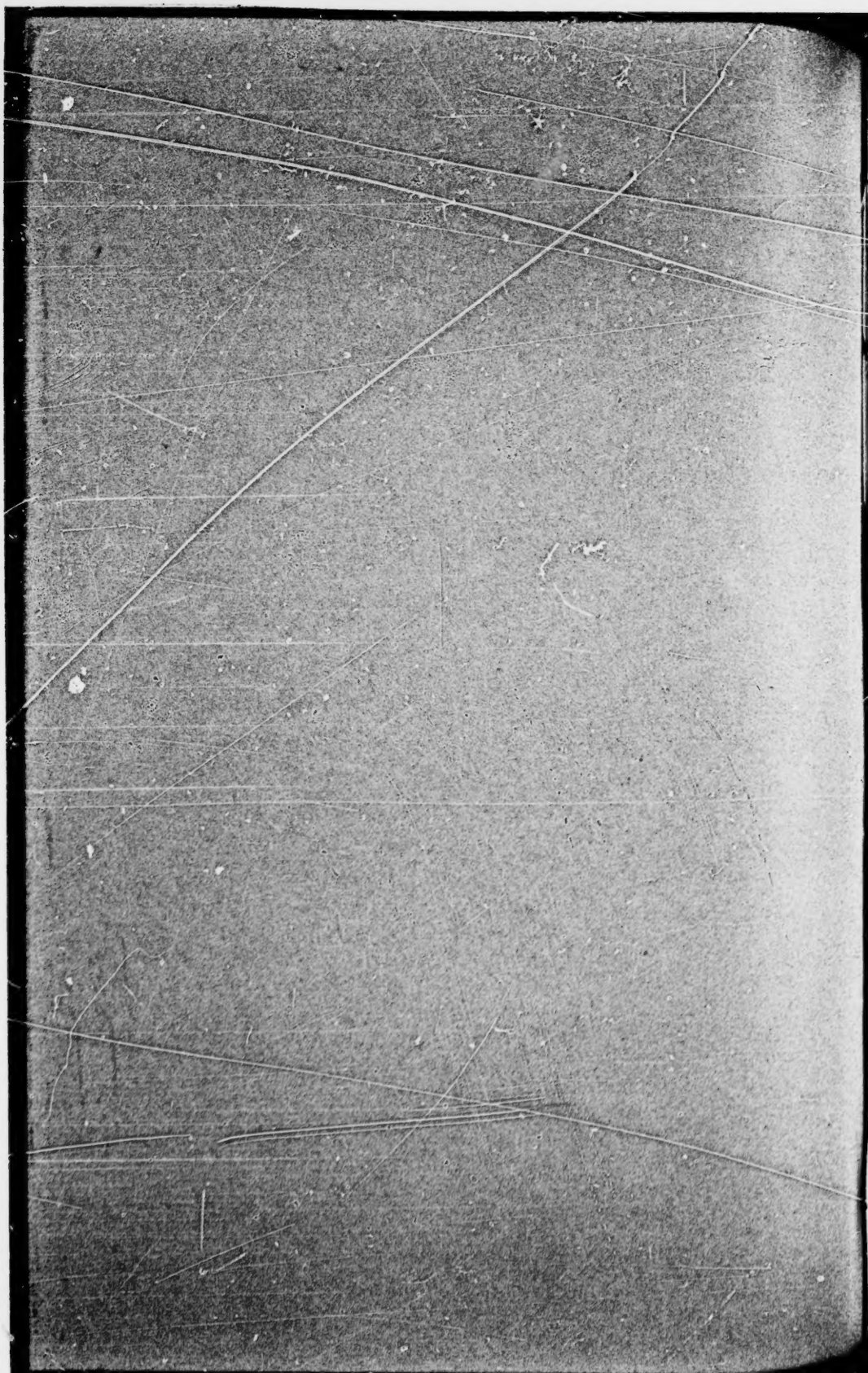

FILED
SEP 13 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958. No. 362

RAYMOND JEREAN KOLLER and
MARTIN SILVERBROOK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ROBERT H. MALIS and
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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1958. No.

RAYMOND JEREAN KOLLER and MARTIN SILVERBROOK,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on June 17, 1958.

OPINIONS BELOW.

The first opinion of the District Court is reported in 143 F. Supp. 154. It and the later memorandum of the District Judge appear in petitioners' appendix in the Court of Appeals at pages 12a and 20a. The opinion of the Court of Appeals is reported in 255 F. (2d) 865 (C. C. A. 3rd Cir., 1958). A copy of the opinion appears in the appendix attached to this petition.

JURISDICTION.

Judgment of the Court of Appeals was entered on June 17, 1958. Jurisdiction of this Court is invoked under 28 U. S. C. A. 1254(1), Act of June 25, 1948, c. 646, 62 Stat. 928.

QUESTIONS PRESENTED.

Does the Civil Statute of Limitations, 28 U. S. C. A., Sec. 2462, prohibiting the institution of suits by the United States to recover a penalty or forfeiture after five years from the date of the occurrences complained of, bar action under the Surplus Property Act of 1944, Sec. 26(b) (1), to recover Six Thousand ($6,000.00) Dollars for the filing of three false certificates by petitioners more than nine years before actions were started?

Does Sec. 26(b) (1) of the Surplus Property Act of 1944 (40 U. S. C. A. Sec. 489), which imposes upon a person committing a prohibited act the burden of paying to the United States the sum of Two Thousand ($2,000.00) Dollars for each such act and double the amount of any damage which

the United States may have sustained, impose a pecuniary civil fine, penalty or forfeiture upon such person?

STATUTES INVOLVED.

28 U. S. C. A. Sec. 2462, Act of June 25, 1948, c. 646, 62 Stat. 974:

> "Time for commencing proceedings
>
> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

40 U. S. C. A. Sec. 489, Act of June 30, 1949, c. 288, Title II, Sec. 209, 63 Stat. 392:

> . . . . . .
>
> (b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property under this chapter, chapter 11B of Title 5, chapter 4 of Title 41 and chapter 11 of Title 44 ——
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

STATEMENT OF THE CASE.

The United States began a civil suit in the District Court for the Eastern District of Pennsylvania against petitioners and others on the twelfth day of May, 1955. The complaint charged that petitioners took advantage of their status as veterans to buy three surplus motor vehicles from the Surplus Property Administrator for the benefit of a non-veteran, and in so doing filed three false certificates relating to their ownership of a business in which the vehicles were to be used (R. 6a, 7a).

The three acts complained of occurred on July 12, 1945, March 15, 1946 and June 3, 1946, approximately nine years before the filing of the complaint (R. 9a). The government demands the sum of $2,000.00 for the single fraudulent act alleged to have been committed by appellant Silverbrook and $4,000.00, in the aggregate, for the two alleged fraudulent certificates filed by appellant Koller. While a claim for double damages, in addition, is demanded in the complaint, no allegation of actual damage is presented, nor was any evidence of actual damage introduced in the proceedings below.

Both petitioners had been indicted for, and had entered pleas of guilty in 1950 to, the commission of the identical acts, and each had been sentenced to pay a fine at that time.

On April 3, 1957, the United States filed motions for summary judgments against petitioners, setting forth the convictions and demanding the entry of judgment in the sum of $2,000.00 against Silverbrook (R. 15a) and $4,000.00 against Koller (R. 16a). These motions were subsequently amended by the United States to eliminate therefrom the last two words in the motions, reading "in forfeitures" (R. 18a, 19a).

Petitioner Silverbrook had resisted the efforts of the United States by a motion to dismiss the complaint in January, 1956, raising the question of limitations (R. 11a). Honorable C. William Kraft, District Judge, denied this motion to dismiss (R. 12a) and petitioner answered responsively again raising limitations (R. 14a).

Upon the filing of the government's motions for summary judgment, petitioners again resisted in reliance upon the Statute of Limitations (R. 17a). The amended motions of the government were reluctantly granted on August 5, 1957, and judgments entered in favor of the United States against Silverbrook for $2,000.00 and against Koller for $4,000.00 (R. 20a, 21a).

Defendants promptly appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court on July 17, 1958. It is from that affirmance that your petitioners now respectfully invoke the review of this Court.

REASONS FOR GRANTING THE WRIT.

The questions here involved have never been directly decided by the Supreme Court. There is a conflict in the several circuits and in the Court of Claims. The 5th Circuit

in *United States v. Weaver*, 207 F. (2d) 796, agrees with the Third Circuit in the matter; the 6th Circuit, in *United States v. Witherspoon*, 211 F. (2d) 858, and the Court of Claims in *Erie Basin Metal Products, Inc. v. United States*, 150 F. Supp. 561, both firmly hold otherwise.

The instant judgment destroys in its entirety the Act of Congress establishing limitations on civil actions (28 U. S. C. A. Sec. 2462).

The instant judgment destroys the plain meeting of our language and of the applicable law.

There are similar actions in the several judicial districts all over the United States, which are undecided by reason of the conflicts in the Circuit Courts and of the dictum in *Rex Trailer v. United States*, 350 U. S. 148, and clarification as to the Supreme Law of the land is desirable.

We respectfully submit that the question is one which it is in the public interest to have decided by the court of last resort.

ARGUMENT.

The narrow issue is whether Section 26(b) (3) of the Surplus Property Act, requiring a person committing a prohibited act to pay to the United States the sum of Two thousand ($2,000.00) dollars for each fraudulent act, in addition double the amount of any damages which the United States may have sustained, is a civil fine, a penalty or a forfeiture. If the provision of Section 26(b) (1) is such a fine or penalty, then the instant action is barred by the Statute of Limitations of five years provided in 28 U. S. C. A. 2462, prohibiting ". . . an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise," unless instituted within five years. Until the decision of the Supreme Court of the United States in *Rex Trailer Co. v. United States*, 350 U. S.

148 (1956), there was no doubt that the provisions of the Surplus Property Act (almost identical to those of the False Claims Act, 31 U. S. C. A. Sec. 231) constituted proceedings to collect a penalty and forfeiture of a pecuniary civil nature. *Huntington vs. Attrill*, 146 U. S. 657; *United States vs. Rohleder*, 157 Fed. (2d) 126; *United States vs. Witherspoon*, 211 Fed. (2d) 858.

In the decision of the Supreme Court in *Huntington v. Attrill, supra*, a penalty was defined as ". . . any extraordinary liability to which the law subjects the wrongdoer in favor of the person wronged, not limited to the damages suffered."

In the opinion of the Supreme Court in *Marcus v. Hess*, 317 U. S. 537, decided in 1943, the court referred throughout to the language of the False Claims Act as a penalty in express terms, as did Judge McLaughlin in dealing with a suit brought under the False Claims Act in *United States v. Rohleder, supra*. *Marcus v. Hess* merely affirmed the difference between *criminal* penalties and *civil* penalties, and held that the defense of double jeopardy would not lie to prevent the claim for recovery of the civil forfeiture.

The False Claims Act further contains its own limitations section requiring the commencement of suit within six years. The anomalous result of the holding in the instant case is that a suit brought under the False Claims Act, providing for the identical penalty as in the Surplus Property Act, is barred by limitations, whereas a suit under the Surplus Property Act for the same offense is not barred. After the decisions in *United States v. Weaver*, 207 Fed. (2d) 796 and in *United States v. Rex Trailer Co., supra*, the U. S. Court of Claims still reached the conclusion urged here in *Erie Basin Metal Products, Inc. v. United States*, 150 F. Supp. 561, after an exhaustive review of the problem by the entire court, and distinguished the situation at Bar from the situation which obtained in *Rex Trailer Co. v. United States*. Until the instant decision by the Court of Appeals for the Third Circuit, the expression of the Court

of Claims was the last expression on the subject, and, we respectfully submit, the proper one.

The language of the court in *Rex Trailer Co. vs. United States* has produced untold confusion among the Bench and the Bar alike by reason of the circumstances under which the opinion was handed down and by reason of the interchange of terms which occurred therein. Initially, the Supreme Court was faced with the problem of double jeopardy, exactly as in *Marcus v. Hess, supra*, and need not have decided anything other than that the provisions for penalties and forfeitures in the Surplus Property Act were *civil* in nature. Whether they were forfeitures or penalties or compensatory was not the issue, so long as they were not *criminal*. Unfortunately, Mr. Justice Clark, in the opinion in *Rex Trailer*, interchangeably employed the words "penal," "criminal," "compensatory" and "civil." His concluding statement, ". . . it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a *civil* remedy into a *criminal penalty*" (emphasis supplied), raises doubt as to the plain meaning of the expressions used.

We respectfully submit that the language of the Supreme Court, defining a penalty in *Huntington vs. Attrill, supra*, has been the law of the land since the days of the early common law. There is no impossibility in the law of the co-existence of civil penalties and criminal penalties. The inference was created by the Supreme Court in *Rex Trailer Co. v. United States, supra*, that a penalty is of necessity criminal, and that if an action be civil, then of necessity it is compensatory.

The holding of the United States Court of Appeals for the Third Circuit in this case, if it is the law of the land, has destroyed without a trace the entire force of the Act of Congress in establishing a period of limitations within which the United States must commence an action to recover a civil fine, penalty or forfeiture.

CONCLUSION.

For the foregoing reasons, we respectfully urge that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ROBERT H. MALIS,
of MALIS, MALIS & MALIS,
Attorneys for Petitioners.

APPENDIX.

OPINION OF UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 12,371.

UNITED STATES OF AMERICA

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.

RAYMOND JEREAN KOLLER,

Appellant.

No. 12,372.

UNITED STATES OF AMERICA

v.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.

MARTIN SILVERBROOK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 19, 1958
Before: BIGGS, Chief Judge, and GOODRICH and McLAUGHLIN, Circuit Judges.

OPINION OF THE COURT.

(Filed June 17, 1958)

BY BIGGS, Chief Judge.

The two appeals at bar, arise out of a single case in the court below, and may be appropriately disposed of in a single opinion. This civil suit was instituted against the defendants under Section 26(b) (1) of the Surplus Property Act of 1944[1] to recover the sum of $2,000 and double damages for each of several fraudulent transactions alleged to have been engaged in by the defendants.

The United States filed motions for summary judgment against each of the defendants. Set out in the motions, as their bases, were indictments handed down against Koller and Silverbrook and others, alleging violations of Title 18, USC, 1940 ed. §80 (Mar. 4, 1909) C. 321 §35, 35 Stat. 1095. The asserted violations were that Koller and Silverbrook and others had engaged in a fraud upon the United States by filing false applications for priority in the purchase of property of the United States and were the identical acts alleged in the complaint in the present civil action. Both Koller and Silverbrook had pleaded guilty to the indictments and had been fined. The court below in the instant

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[1] Act of October 3, 1944, ch. 479, 58 Stat. 765 as amended, repealed, and reenacted as of June 30, 1949, ch. 288, Title II, Section 209, 63 Stat. 392, 40 U. S. C. §489.

case correctly found that the pleas of guilty entered by Koller and Silverbrook in the criminal case referred to conclusively established the issue of fraud against them in the case at bar. On August 7, 1957 the court below entered judgment against both Koller and Silverbrook and the appeals at bar followed.

The acts complained of were committed by Silverbrook on March 15, 1946 and by Koller on July 12, 1945 and June 3, 1946. The complaint in the instant case was filed on May 12, 1955, more than nine years after the completion of the acts complained of. While the general rule is that the statute of limitations ordinarily does not run against the United States, United States v. Summerlin, 310 U.S. 414 (1940), where the action brought by the United States is for the enforcement of a civil fine, penalty, or forfeiture, the statute of limitations is five years.[2] The narrow issue, therefore, is whether Section 26(b) (1) of the Surplus Property Act, which requires a person committing the prohibited act to pay the United States the sum of two thousand dollars for each fraudulent act in addition to double the amount of any damages which the United States may have sustained by reason of Koller's and Silverbrook's activities provides a civil fine, a penalty, or a forfeiture, or merely compensatory damages.

The United States, relying upon the opinion of the Supreme Court in Rex Trailer Co. v. United States, 350 U. S. 148 (1956), argues that the Surplus Property Act does not impose a civil fine, a penalty or a forfeiture and therefore the statute of limitations set forth in Section 2462, 28 U. S. C., does not bar suit on the claims before this court. Koller and Silverbrook contend that Section 26(b) (1) does impose a civil penalty and since the decision of the Supreme Court in Rex Trailer did not deal with the statute

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[2] "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." 28 U.S.C. §2462.

of limitations issue it affords no authority for the determination of the issue at bar. We cannot agree with defendants' contentions.

In Rex Trailer the Supreme Court had before it the issue of whether the Rex Trailer Company, which had pleaded *nolle contendere* to a charge of fraudulently purchasing motor vehicles under the Act, and had been fined in that criminal proceeding, was subjected to double jeopardy when sued by the United States in a civil action under Section 26(b) (1) to recover $2,000 for each prohibited act, the acts complained of being those set out in the indictment in the criminal case. The court held in substance that the recovery sought under Section 26(b) (1) was civil in nature and did not put the Trailer Company in jeopardy in violation of the Fifth Amendment.

The principal question presented for decision in Rex Trailer v. United States was stated to be whether the provisions of Section 26(b) (1) are civil or criminal. While the issue in Rex Trailer was one of double jeopardy, the Court, 350 U. S. at p. 149, stated that certiorari was granted to resolve an asserted conflict between the decisions of the Courts of Appeals. In footnote 2 it stated, "In considering whether the statute of limitations contained in 28 U. S. C. §2462 applied to §26(b) (1) of the Surplus Property Act the Fifth Circuit held §26(b) (1) to be a civil remedy in United States v. Weaver, 207 F. 2d 796, 797, and the Sixth Circuit held it to be penal in United States v. Witherspoon, 211 F. 2d 858."

In holding that Section 26(b) (1) of the Surplus Property Act created a statutory right in the United States to recover liquidated damages which were thought by the Court to be reasonable, we believe that the Court intended to put at rest the "asserted" conflict between the circuits. See United States v. Hougham, 148 F. Supp. 715 (S. D. Cal. 1957); United States v. Schneider, 139 F. Supp. 826 (S. D. N. Y. 1956); dissenting opinion of Judge Madden in Erie Basin Metal Products, Inc. v. United States, 150 F. Supp.

561, 566-7. But see the majority opinion in Erie Metal Products v. United States, *supra*.

We are of the opinion that Section 26(b) (1) does not provide for a penalty but is remedial in nature. We are buttressed in this view by the opinion of the Supreme Court in United States ex rel. Marcus v. Hess, 317 U. S. 537 (1943). This case involved an action under the False Claims Act, 31 U. S. C. A. §231, which contained language similar to that in Section 26(b) (1) of the Surplus Property Act. It provides that a person who commits certain frauds upon the United States ". . . shall forfeit and pay to the United States the sum of $2,000, and in addition, double the amount of damages which the United States may have sustained. . . ." The Court held that this provision for the recovery of $2,000 and double damages for each fraud was a compensatory civil remedy and therefore was remedial in nature. The Court stated, 317 U. S. at p. 551, "We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure the government would be made completely whole."

The opinion in Marcus v. Hess was handed down on January 18, 1943. The Surplus Property Act, which employed virtually identical language, was enacted on October 3, 1944. As Mr. Justice Clark stated in footnote 4 cited to the text at 350 U. S. at p. 152, of Rex Trailer, "Under these circumstances it would be very difficult to say that these words which provided a civil remedy in the False Claims Act were not intended to provide the same kind of remedy in the Surplus Property Act."

Moreover, it should be noted that Section 26(b) contains three subsections.[3] The latter two clearly provide for

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[3] Section 26(b) of the Surplus Property Act, Title 40 U. S. C. §489 provides as follows:

"(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device for the purpose of securing or obtaining, or aiding to secure or obtain,

multiple damages in the form of or as liquidated damages. These two subsections provide without question a remedy clearly compensatory in nature. Both the wording of Section 26(b) and the pertinent Committee Report, S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14, show that the United States was to have the option of selecting as its remedy any one of the three different measures of damages. It is a reasonable construction of the section that Congress intended all three subparagraphs of Section 26(b) to be *in pari materia*. We cannot hold that Congress intended that the first of the three subsections set up a penalty section and the other two provided merely for compensatory liquidated damages.

The fact that Section 26(b) (1) allows for the recovery of $2,000 in addition to the double damages does not make that section punitive. In Helvering v. Mitchell, 303 U. S. 391 (1938) a 50% assessment upon those who committed fraud under the Revenue Act of 1928 was not considered a penalty, but rather was held to be a civil administrative sanction of a remedial nature. See Scadron's Estate v. Commissioner, 212 F. 2d 188 (2 Cir. 1954), cert. den. 348 U. S. 832 (1954); Kirk v. Commissioner, 179 F. 2d 619 (1 Cir. 1950); Reimer's Estate v. Commissioner, 180 F. 2d 159 (6 Cir. 1950).

The nature of the recovery is not altered by the inability

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for any person any payment, property, or other benefits from the United States, or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—

"(1) shall pay to the United States the sum of $2,000. for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or

"(2) shall, if the United States shall so elect, pay to the United States, as **liquidated damages**, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

"(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as **liquidated damages** any consideration given to the United States or any Government agency for such property." (Emphasis added.)

of the United States in the case at bar to show actual damage, since, as was held in Rex Trailer Co., the remedy provided by 26(b) (1) is comparable to a recovery under a liquidated damage provision which fixes compensation for anticipated loss. That the United States had a legitimate proprietary interest in insuring the disposal of its surplus materials to veterans in accordance with the announced policy and objectives of the Surplus Property Act, and that it suffered compensable damage under the statute by defendants' manifest perversion of that policy are propositions which have been settled beyond the need for further review. Rex Trailer Co. v. United States, *supra*; United States v. Bound Brook Hospital, 251 F. 2d 12 (3 Cir. 1958). Daniel v. United States, 234 F. 2d 102 (5 Cir. 1956).

We conclude that Section 26(b) (1) provides for compensatory damages, and that the statute of limitations, Section 2462, 28 U. S. C., did not bar this action in the court below. The judgment of the court below will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

JUDGMENT OF UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 12,371.

UNITED STATES OF AMERICA

vs.

EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERT ERSAL SHIPTON, MORRIS SHNEER.

RAYMOND JEREAN KOLLER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, Chief Judge, and GOODRICH and McLAUGHLIN, Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

June 17, 1958.

JUDGMENT OF UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT

No. 12,372

UNITED STATES OF AMERICA
vs.
EDWARD DOMAN, ALEXANDER JOSEPH DOMAN, RAYMOND JEREAN KOLLER, MORTON ZEIDMAN, HOWARD ALBERT BORDEN, JACK LEONARD ERLBAUM, JOHN DANIEL GUILLE, MARTIN SILVERBROOK, JOSEPH HENRY GREENSTONE, STANLEY BEAR, LIBERS ERSAL SHIPTON, MORRIS SHNEER.
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